



November 12, 2002

Ms. Sheri Bryce Dye
Assistant Criminal District Attorney
Bexar County
300 Dolorosa, Fifth Floor
San Antonio, Texas 78205-3030

OR2002-6418

Dear Ms. Dye:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 172029.

The Bexar County District Clerk (the “clerk”) received a request for federal subpoenas received by the clerk requesting records for an IRS investigation involving the law office of Alan Brown. You claim that the requested information is excepted from disclosure under sections 552.003, 552.101, and 552.108 of the Government Code. An attorney for the requestor has submitted arguments regarding why the information should be released. *See* Gov’t Code § 552.304 (permitting member of public to submit to attorney general reasons why requested information should or should not be released). We have considered the exceptions you claim and the arguments on behalf of the requestor, and have reviewed the submitted representative sample of information.¹

We first note that the records you submitted include documents compiled in response to the requested subpoenas. The request for information, however, encompasses only the subpoenas themselves. Therefore the additional documents are not responsive to the request and need not be released.

We now address your claims that the requested subpoenas are not subject to disclosure under the Public Information Act (the “Act”) pursuant to section 552.003. To fall under the judiciary exclusion, the records requested must contain information that pertains to judicial

¹ We assume that the “sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

proceedings and be subject to direct supervision of a court. Open Records Decision No. 671 (2001) (citing Open Records Decision No. 646 at 5 (1996)). Under section 51.303 of the Government Code, district court clerks are required to "(1) record the acts and proceedings of the court; (2) enter all judgments of the court under the direction of the judge; and (3) record all executions issued and the returns on the executions." Such information is presumably collected, assembled and maintained in the clerk's case disposition database, and pertains to judicial proceedings. However, the grand jury subpoenas served on the clerk seek records from the clerk and are not themselves among the documents generally collected, assembled, or maintained for the judiciary.

In Open Records Decision No. 513 (1988), this office addressed the applicability of the Act to information before a state grand jury, and found, pursuant to the predecessor to section 552.003, that a grand jury is an extension of the judiciary for purposes of the Act and, therefore, the Act does not apply to information within the actual or constructive possession of a grand jury. ORD 513 at 2. That decision concluded that when an individual or entity acts at the direction of the grand jury as the grand jury's agent, information held or collected by the agent is within grand jury's constructive possession. *See id.* at 2-3. However, the decision does not apply to this case because the requested subpoenas are not judicial records held by the grand jury or its agent. Therefore, we must conclude that Open Records Decision No. 513 and section 552.003 of the Government Code are inapplicable to the requested information, and the requested information is public information subject to the Act as set forth under section 552.002.

You also contend that the requested subpoenas are confidential under section 552.101 in conjunction with Rule 6 of the Federal Rules of Criminal Procedure. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Rule 6(e) of the Federal Rules of Criminal Procedure provides:

(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

Fed. R. Crim. P. 6(e)(2).

Rule 6(e)(2), in its prescription of general secrecy, refers to the previous subsection, which provides that "[a]ll proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device." Fed. R. Crim. P. 6(e)(1). In addition, Rule 6(e)(3)(A)(ii) provides that disclosures otherwise prohibited by the general

rule of secrecy may be made to “such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney’s duty to enforce federal criminal law.” *See id.* 6(e)(3)(A)(ii).

In the subject request, the subpoenas in question are referred to as “federal subpoenas received by your office requesting records for an IRS investigation involving the law office of Alan Brown.” You have not shown that the clerk or any employee of the clerk received the subpoenas as a result of being among the persons subject to the secrecy rule. *See id.* 6(e)(2), (3). Accordingly, we must conclude that the requested subpoenas did not come into the possession of the clerk or any of its officials by operation of, or statutory exception to, the secrecy rule, but because the clerk was served with the subpoenas. *See id.* Moreover, section 6(e)(2) states that no obligation of secrecy may be imposed on any person except in accordance with this rule. *See id.* 6(e)(2). Accordingly, we cannot conclude that Rule 6 of the Federal Rules of Criminal Procedure makes the subpoenas confidential.

Finally, you claim that the requested subpoenas are excepted from disclosure under section 552.108. Section 552.108 states that “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if release of the information would interfere with the detection, investigation, or prosecution of crime.” Gov’t Code § 552.108(a)(1). While the clerk is neither a law enforcement agency nor a prosecutor, section 552.108 may be invoked by any proper custodian of information which relates to an investigation or prosecution. *See, e.g.,* Open Records Decision Nos. 474 (1987), 372 (1983); *see also* Open Records Decision No. 586 (1991) (need of another governmental body to withhold requested information may provide compelling reason for nondisclosure under section 552.108). However, you have not represented that the IRS, which is the investigative agency, has requested that this information be withheld. Therefore, we find you have not demonstrated that the information is excepted from disclosure under section 552.108, and the clerk may not withhold it under section 552.108. Consequently, we find that the requested subpoenas must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kristen Bates

Assistant Attorney General
Open Records Division

KAB/seg

Ref: ID# 172029

Enc. Submitted documents

c: Mr. Maro Robbins
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